In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-664.

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents Massachusetts Board of Education, et al., In Opposition to Certiorari.

SANDRA L. LYNCH,
General Counsel,
Massachusetts Board of Education,
182 Tremont Street,
Boston, Massachusetts 02111.
(617) 727-5716
Attorney for the Respondents
Massachusetts Board of Education, et al.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

STATUTES.

PROCEDURAL RULES.

MISCELLANEOUS.

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The respondents Massachusetts Board of Education and Commissioner of Education (hereinafter collectively called the Board of Education) oppose the petition for certiorari of the Boston School Committee. The Board of Education is the state education agency with general superintendence over the Committee. Under state law the Board is mandated to see that the Committee complies with state and federal laws pertaining to education, including the United States Constitution.

Mass. Gen. Laws c. 15, § 1G. The Board believes that the orders of the district court here were a proper exercise of judicial power to protect federal constitutional rights. Though not specifically directed to that end, the orders also helped ensure to all students at South Boston High School the orderly education directed by state law.

Although named a defendant in the proceedings below, the Board of Education was found not to have violated plaintiff's constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). The district court retained the Board as a party in the case to participate in the framing of remedies.

Question Presented.

Whether the Court of Appeals for the First Circuit erred in affirming the district court's

(a) findings of fact that Petitioners were in violation of desegregation orders as to South Boston High School and that the gravity of conditions there required a quick and effective remedy, and

(b) exercise of equitable discretion in naming the Superintendent of Schools as the temporary receiver of the school as an appropriate remedy for conditions there.

Statement of the Case.

The Petitioner Boston School Committee asks this Court to review the judgment of the United States Court of Appeals for

the First Circuit affirming an order of the district court appointing the Boston Superintendent of Schools as temporary receiver for a high school because of failure to comply with desegregation orders and affirming certain orders granting other relief.

The receivership order at issue left untouched Petitioners' authority over the 157 other schools in the Boston system and was concerned with only one school, South Boston High School. The order vested the school official with overall responsibility for the system, the Superintendent, with the responsibility for accomplishing desegregation at the school. The difference resulting from the order is that as to the desegregation of that one school the Superintendent reports directly to the district court and not to Petitioners. The order required the Superintendent to replace some of the existing administrators at the school with others more effective in achieving compliance, and to take other actions.

The order at issue was entered in December, 1975, after extensive evidentiary hearings established that there had been failure to comply with injunctions enforcing a desegregation plan, failure to comply with ancillary orders designed to secure compliance with the injunctions, and failure to take sufficient steps to deal with resistance to desegregation at the South Boston High School (A. 11, 22). The evidence established that conditions at the school were extremely grave — with continuing patterns of segregation and discrimination, little if any education occurring, and danger to the physical safety of black students (A. 20-27, 90-109). The order was entered against a background of obdurate resistance by Petitioners to the court's desegregation orders which had resulted once in their being held in contempt and continuingly in noncompliance with implementation orders (A. 30-37, 109).

Specifically, the order named first an Assistant Superintendent and subsequently the Superintendent of the Boston

Public Schools as temporary receiver for the high school. The powers and duties of the temporary receiver were defined with particularity and are set out in Appendix pp. 55-57. The receiver was to transfer the headmaster and football coach and certain others[1] without any loss of salary, benefits or seniority to other duties and to appoint a new building administrator. The receiver also was to evaluate the performance of existing personnel, to file recommendations to improve the physical plant at the school, to attempt to enroll truant students, and to recommend other steps to the court (A. 55-57).

The evidence as to conditions at the school must be set against the history of the case. Petitioners' liability for intentional segregation of the Boston Public Schools is settled, *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), aff'd sub nom. *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975), as is the propriety of the systemwide desegregation plan ordered into effect, *Morgan* v. *Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), aff'd, 530 F. 2d 401 (1st Cir. 1976), cert. denied sub nom. *Morgan* v. *McDonough*, ___ U.S. ___, 44 U.S.L.W. 3719 (6/14/76).

Even prior to entry of any remedial orders by the federal court, Petitioners violated Massachusetts Supreme Judicial Court orders enforcing a state law racial balance plan on the Boston schools. *Morgan* v. *Hennigan*, 379 F. Supp. at 418-420, 476-77. Under federal court jurisdiction, Petitioners were ordered to submit a systemwide desegregation plan. On the due date for the plan, a majority of the Committee members refused to file the plan prepared by its staff and did not file any other plan, leading their counsel to withdraw from the case. These Committee members were held in contempt. At the contempt hearing they each stated under oath that they

[1] Although the original order provided for the transfer of other personnel, on recommendation of the receiver other administrator transfers were not made although voluntary transfers were allowed (A. 174-175).

would take no action on their own to bring about desegregation but would take only those steps directly ordered by the court. *Morgan* v. *Kerrigan*, 401 F. Supp. at 226. These same members constituted a majority of the Committee at the time of entry of the orders at issue here.

Numerous acts obstructing implementation of the systemwide desegregation plan ensued. Some of Petitioners' actions and inactions affected South Boston High School. For example, the Petitioners took no action for months on the Superintendent's proposal to establish an Office of School Security Services to deliver programmatic and other support services to troubled schools such as South Boston High School[2] (A. 30-32). The school department Office of Implementation, created to implement the plan, was impeded by Petitioners, who refused to appropriate funds for it, appoint staff to it, or give it supplies (A. 33-35). Petitioners' practice was to do nothing other than what the court explicitly ordered (A. 109). Petitioners also failed to meet their state law obligations, Mass. Gen. Laws c. 77, § 13, to act against persons inducing truancy, although several South Boston groups were notoriously successful in promoting school boycotts at the high school in violation of state law (A. 10, 11, 21, 98).

While Petitioners continued in their posture of resistance to the court orders, the plaintiff black school children encountered intense resistance to the desegregation of South Boston High School. Despite claims that it was a neighborhood school prior to desegregation, approximately 800 white students not from South Boston had been assigned there. *Morgan* v. *Hennigan*, 379 F. Supp. at 426, 475. The school was specifically found to have been maintained as an identifiably white school in violation of the Constitution. *Id.*

[2] At the time of this brief, more than a year later, Petitioners have still not appointed someone to head this office.

The opening of school under the interim desegregation plan in September of 1974 saw the stoning of school buses carrying black children to South Boston High School. State police and local police were stationed in and around the school (A. 8, 21). In December, 1974, a white student in South Boston High School was stabbed. A crowd of South Boston residents surrounded the school and trapped all the black students inside, until a diversionary police operation allowed the black students to leave from the rear of the building (A. 8, 21). *Morgan* v. *Kerrigan*, 401 F. Supp. at 225.

Hearings held in December of 1974 on ancillary remedies concerning school security revealed a number of violations within the school. There was evidence at the hearings that white students roamed the halls chanting racial slurs (A. 9, 21; Tr. 12/13/74, pp. 80-104); that hostile white adults were allowed into the school where they sometimes promoted disturbances (Tr. 12/13/74, pp. 76-113); that segregated meetings of students were held in the school (Tr. 12/13/74, pp. 106-107); and that racial slurs were written on blackboards and walls (Tr. 12/13/74, pp. 100-101). In response to this evidence and at other times the district court entered orders concerning the assignment of police to South Boston High School, access of other people to the schools, use of racial epithets, threatening of violence, and establishment of safe areas around schools and bus routes (A. 11, 22).

In November of 1975 conditions at South Boston High School began to resemble those of the prior December and, in the view of some witnesses, were worse (A. 180). On November 17, 1975, the plaintiffs moved that the court order South Boston High School to be closed and the student body moved to another site or dispersed to other schools. The hearings

commenced on November 21, 1975, and concluded on November 28, 1975.[3]

The evidence established that black students were being denied their right to an orderly desegregated education at South Boston High School. There was no order. Instead, there was danger to the physical safety of black students (A. 180). There was little desegregation. Instead, there was overt discrimination and segregation in the school (A. 181). And there was little education. Instead, a custodial atmosphere prevailed (A. 183). What was being accomplished indirectly was what Petitioners could not have directly accomplished: the maintenance of an identifiably white South Boston High School in violation of the Constitution.

Specifically, black students were subject to physical assaults and continuing verbal abuse by groups of white students and were disciplined for defending themselves while the white students went undisciplined (A. 4, 20, 180). White students chanted "2, 4, 6, 8, assassinate the nigger apes," in violation of the order against use of racial slurs (A. 4, 20). The white student caucus demanded that music be played over the school's public address system because "music soothes the savage beasts" (A. 5, 21). On numerous occasions school staff failed to take any corrective action for such slurs (A. 181). Scurrilous and inflammatory handbills were distributed to white students and slogans in resistance to the desegregation order were painted on the school (A. 99).

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[3] The procedural due process claims that appear to be raised in the Petition were not raised before the court of appeals. Further, the purpose of the hearings and allegations to be answered were specifically set forth in plaintiffs' motion. The subject of South Boston High School was familiar to the court and counsel. The issue of receivership had been thoroughly briefed by all counsel earlier in the case in response to the U.S. Civil Rights Commission report in August of 1975 recommending the entire school system be placed in receivership due to Petitioners' noncompliance. As the evidence demonstrated, there was an urgent need to provide relief to the school.

The football coach, using a variety of pretexts, excluded black students from the football team (A. 23-26). Despite court orders to the contrary, black and white students were kept separate in classrooms and in the lunchroom (A. 181). In one instance the headmaster reprimanded a black student who attempted to sit at a table with white students (A. 181). The school administration did not direct that classroom seating be desegregated and conducted segregated assemblies (A. 181).

The faculty was hostile to the implementation of the desegregation plan (A. 182). It refused to cooperate with teams from the Superintendent's office or the court-created Citywide Coordinating Council on reducing tensions in the school (A. 182). There were no black administrators at the school (A. 97). Statements by the few black teachers about problems at the school drew contradictory remarks from white teachers, who were applauded and cheered (A. 182). The school handbook, prepared by the administration, lauded the South Boston High School Home & School Association, a group dominated by nonparents and known for its opposition to desegregation (A. 180).

The headmaster did not seem capable of addressing racial problems directly (A. 108-109). When students complained of the prison-like atmosphere, he put the responsibility for changing that atmosphere on them (A. 182). The district court, on taking two views of the school, found the services there to be primarily custodial and only incidentally educational although the headmaster had testified there was learning going on in every room. (A. 183).

The average daily student attendance rate for the school was 60 per cent of enrollment, compared with a citywide average of 86 per cent, and attendance of black students was particularly low (A. 183). The school and its annex had the highest suspension rate of any school in the city and accounted for nearly half of all high school suspensions (A. 183). The

president of the faculty senate testified that the situation was deteriorating and was similar to the atmosphere preceding the stabbing of a student the year before (A. 29). In fact, enrollment at the school was drastically dropping (A. 87, 95-97), creating an urgent situation which led the court to conclude that there would not be much of the school left to keep open if matters continued unchanged (A. 87).

Faced with this evidence of conditions at the school, the Petitioners took no action and made no proposals as to remedies. They instead argued that the plaintiffs' allegations and evidence were part of a sinister plot by the black community to close the school, an argument unsubstantiated by a scintilla of evidence (A. 29). Having offered no solution to the problems, Petitioners now seek review of the orders of the district court designed to address the problems.[4]

Reasons for Denying the Writ.

I. Introduction.

The Massachusetts Board of Education regrets the conditions that led to the receivership and hopes that it may be terminated soon. Nonetheless, in the Board's view, conditions at South Boston High called imperatively for a remedy, and the receivership orders are a reasonable and proper exercise of judicial power in light of the conditions at the school.

While unusual, the receivership orders do not present issues which warrant the granting of review by this Court. The power to appoint a receiver is a recognized equitable remedy

[4] The later orders contained in the Appendix at pp. 166-175, 192-198 are not presented to this Court for review by the Petition but are the subject of a separate appeal pending before the court of Appeals for the First Circuit.

traditionally available to federal trial courts. The decision of the Court of Appeals for the First Circuit affirming the receivership turns on the peculiar facts of this case and is not in conflict with the decisions of any other court of appeals or this Court's decisions. Review by this Court is unlikely to provide guidance for lower courts in future cases.

II. The Orders Were Limited And Were Reasonable.

The characterization of the district court's order as a "receivership" may tend to obscure its limited nature. It is limited because it does not bring in an outside receiver, but utilizes the Superintendent of Schools, whose normal authority encompasses South Boston High School. It is also limited because it is restricted in duration and function to securing compliance with the desegregation plan. It does not involve the district court in nondesegregation matters at the school such as educational policy or philosophy. The functions the receiver is required to perform are, in many instances, identical to those performed by masters. It is also less drastic than the plaintiffs' proposed remedy.

The "receivership" order places responsibility on the Superintendent to secure compliance with the desegregation decree at South Boston High School, while temporarily removing from Petitioners the opportunity to obstruct compliance at that school. The Superintendent, a defendant in this case, with separate counsel on this issue, has not appealed from this order. The specific functions required of the receiver are consistent with the Superintendent's normal authority. While the order requires the appointment of a new headmaster and others, this is consistent with the Superintendent's exclusive authority under state law to nominate all non-civil service personnel in the school system. Mass. St. 1965, c. 208, § 1.

Other actions required of the receiver will also remedy violations of state law at the school. Massachusetts law requires students receive a full 180 days of education a year or equivalent number of hours. Mass. Gen. Laws c. 15, § 1G, and regulations promulgated thereunder. State statutes prohibit discrimination based on race in admission to school and in any courses or advantages offered in a school. Mass. Gen. Laws c. 76, §§ 5, 16. State law requires the offering of physical education and requires that female students receive athletic offerings equal to those available to male students, both requirements addressed by the court's repair and equipment orders. Mass. Gen. Laws c. 71, § 3, c. 76, § 5.

Further, the Massachusetts Board of Education cannot support Petitioners' arguments that the district court "overzealously designed its own high school and equipped it with wall-to-wall educational policy tightly insulated from the democratic process." Petition, p. 11. There have been no orders from the district court regarding programs, courses, curriculum, textbooks, teaching style or any other matters that may be characterized as involving educational policy or philosophy. Petitioners are free to set or not set educational policy for the system, including South Boston High School, as they have always done. The receiver is the chief educational officer of the system, which insures that the desegregation steps taken at the school will be consonant with the system's educational philosophy.

Many of the functions performed by the "receiver" in investigating conditions at the school and recommending curative measures to the court are identical to those performed by masters. See Fed. R. Civ. P. 53(e); Note, *Monitors: A New Equitable Remedy?*, 70 Yale L.J. 103 (1960). Masters have been used to supervise elections, *Schonfeld* v. *Raftery*, 271 F. Supp. 128 (S.D. N.Y.), aff'd, 381 F. 2d 446 (2d Cir. 1967); to develop and enforce remedial plans in employment discrimina-

tion cases, Harris, *The Title VII Administrator*, 60 Cornell L. Rev. 53 (1974); and in numerous civil rights cases to formulate and secure implementation of remedies, *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12, 25 (2d Cir. 1971); *Morales* v. *Turman*, 383 F. Supp. 53 (E.D. Tex. 1974); *Hamilton* v. *Landrieu*, 351 F. Supp. 549 (E.D. La. 1972); *Wyatt* v. *Stickney*, 344 F. Supp. 373, 378, 344 F. Supp. 387, 392, 407 (M.D. Ala. 1972) (later history omitted); *Knight* v. *Board of Education*, 48 F.R.D. 115 (E.D. N.Y. 1969).

The limited nature of the district court's remedial orders must also be recognized in light of the motion before the court to close the school. The court declined to close the school as the plaintiffs urged and as the Mayor of Boston had urged the year before (A. 29). Greater interference with the school system would have resulted if the court had granted the motion to close the school. Other high schools were overcrowded and no readily available alternate sites for the school existed. Resolution of these problems would have occasioned far greater intrusions into the management of the Boston public schools. And the rights of black and white students assigned to South Boston High School to an education would inevitably be lost for a period of time.

III. The District Court Orders Were Not An Abuse of Discretion.

In response to the serious conditions at the school, the district court was required to order "quick and effective" relief "necessary and appropriate to put an end to the racial discrimination practiced against [plaintiffs]." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232 (1964). The facts establishing the urgency of the situation are not contested by Petitioners.

Yet, in a continuing abdication of their responsibilities, Petitioners took no action to help the situation. Contrary to their present complaints (Petition, p. 14), there was full argument in the district court as to possible remedies. At no time, however, did Petitioners propose any remedies, much less use their authority to implement any themselves. Indeed, counsel for Petitioners argued before the court of appeals that the district court had no basis for acting as the school was not burning down (A. 185). It was entirely reasonable for the district court to conclude that Petitioners — who had been held in contempt, who had sworn they would do nothing save what they were ordered to do, and who had continued their resistance throughout implementation — would not ameliorate and might well aggravate the situation (A. 184-187).

Nor was it unreasonable for the district court to conclude that the administration of the school was incapable of bringing the school into compliance. The faculty was hostile to the court orders and remained racially identifiable. The headmaster had had a notable lack of success and, it could reasonably be concluded, would be unable to accomplish compliance.

Under these circumstances, it would have been reasonable for the lower courts to conclude that a limited, temporary receivership was the least drastic effective remedy available. Further injunctive orders to enforce existing injunctions held little promise, particularly given the ability of a complicated organization like the Boston school system to blur lines of responsibility. See *Columbian Athletic Club* v. *State*, 143 Ind. 98, 40 N.E. 914 (1895). Contempt would have been a slow, cumbersome, and at best indirect attempt at a solution. See *Milltown Lumber Co.* v. *Town of Milltown*, 150 Ga. 55, 102 S.E. 435 (1920). The receivership order here may be less intrusive than contempt and injunctions since the authority to resolve numerous problems with implementation impossible to

specify in advance is left with the local official with educational expertise.

IV. The Orders Were Within the Traditional Equitable Jurisdiction Of The Federal Courts.

The district court's orders are consistent both with this Court's decisions and with the doctrines of the law of equity.

This Court's desegregation opinions have stressed repeatedly the breadth and flexibility of equitable remedies available to trial courts. In *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955), the Court stated:

> In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 28 (1971), the Court stated that a district court's power to fashion and effectuate desegregation decrees is broad and flexible, and that the remedies may be "administratively awkward, inconvenient, and even bizarre." *Green* v. *County School Board*, 391 U.S 430, 439 (1968), required the district courts to fashion prompt and effective relief. This Court recently reaffirmed that "all reasonable methods" are available to secure an effective remedy for constitutional violations. *Hills* v. *Gautreaux*, 96 S. Ct. 1538 (1976).

Receiverships are a familiar equitable mechanism available to secure complete relief. Fed. R. Civ. P. 66; 4 Pomeroy,

Equity Jurisprudence §§ 1330 et seq. (Symons ed. 1941). A receivership was imposed once on a public school for violation of a desegregation order. *Turner* v. *Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966). While receiverships have most often been used for supervision of failing businesses, the law of receiverships encompasses the use made of receiverships here.

Receivers may be imposed by a court for the purpose of securing compliance with laws and with court orders. In *United States* v. *American Tobacco Co.*, 221 U.S. 106, 186 (1911), this Court noted the permissibility of naming a receiver for a company to enforce compliance with the anti-trust laws. More recently, it has become common in Securities and Exchange Commission enforcement suits to issue receivership orders for the purpose of securing compliance with the securities acts and court orders. *S.E.C.* v. *S & P Natl. Corp.*, 360 F. 2d 741, 750-53 (2d Cir. 1966); *Los Angeles Trust Deed & Mortgage Exchange* v. *S.E.C.*, 285 F. 2d 162, 181 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961); *S.E.C.* v. *Fifth Avenue Coach Lines*, 289 F. Supp. 3, 42 (S.D. N.Y. 1968), aff'd, 435 F. 2d 510 (2d Cir. 1970); see Farrand, *Ancillary Remedies in S.E.C. Civil Enforcement Suits*, 89 Harv. L. Rev. 1779 (1976). The traditional law of receivership contemplated use of receivers as well to perform acts necessary for compliance with a decree. 1 R. Clark, *Law of Receivers* § 240 (3d ed. 1959).

Receivership is an ancillary remedy, used as a means to reach some legitimate end and not as an end in itself. *Gordon* v. *Washington*, 295 U.S. 30 (1935). In the instant case, receivership was used as an ancillary remedy to secure compliance with the injunctions enforcing the desegregation plan, and was used only after other ancillary relief had been tried. A similar use of receivership was made in *S.E.C.* v. *Keller Corporation*, 323 F. 2d 397 (7th Cir. 1963), which held, at 403:

> It is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of Kellco's affairs for the benefit of those shown to have been defrauded. In such cases the appointment of a trustee-receiver becomes a necessary implementation of injunctive relief.

The court also held that the defendants' past conduct gave rise to a reasonable likelihood of future violations and this was sufficient to warrant a receivership. *Id.* at 402.

Where a public interest is involved in a proceeding, such as the constitutional rights involved in the instant case, a court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also *Virginia Railway Co.* v. *System Federation*, 300 U.S. 515, 552 (1937). Receiverships, in particular, are utilized more readily where they would serve to protect the public welfare and not merely to preserve private property rights. *Farmers Grain Co.* v. *Toledo, P. & W. R.R.*, 158 F. 2d 109, 115-116 (7th Cir. 1946). Prior to the 1933 enactment of Chapter 77B of the Bankruptcy Act, receivership of railroads by federal courts was common due to the public interest in proper running of the railroads. See 6 Collier, *Bankruptcy* § 0.04; Sabel, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 20 Iowa L. Rev. 83 (1934).

A remedy that is commonly available to private litigants and is frequently used to protect statutory public interests cannot, as Petitioners argue, *per se* be unavailable in enforcing constitutional rights after repeated defaults. Petitioners are not beyond reach of law. *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

Conclusion.

For the reasons argued above, the petition for certiorari should be denied.

Respectfully submitted,

SANDRA L. LYNCH,
General Counsel,
Massachusetts Board of Education,
182 Tremont Street,
Boston, Massachusetts 02111.
(617) 727-5716

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